Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

THE CROW TRIBE OF INDIANS,

Cross-Petitioner,

v.

STATE OF MONTANA; MARY BRYSON; BIG HORN COUNTY; MARTHA FLETCHER; and UNITED STATES OF AMERICA,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether doubts should be resolved against the wrongdoer and appropriate equitable relief should be fashioned to remedy the violation of the statutory and sovereign rights of the Crow Tribe by the imposition of Montana's invalid 30% taxes on the Tribe's coal resources based on the courts' finding that the illegal taxes "impair[ed] the tribe's ability to negotiate leases with Shell Oil and other coal companies."

PARTIES

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner Crow Tribe of Indians (Tribe) hereby conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals that is the subject of this appeal is reported at 92 F.3d 826 and 98 F.3d 1194 (1996) (*"Crow IV"*) and is reproduced in the Appendix to the Petition (Pet. App.) commencing at 1. Prior decisions in this matter by the Ninth Circuit are reported at 650 F.2d 1104 (1981), *amended*, 665 F.2d 1390 (1982) (*"Crow I"*), *cert denied*, 459 U.S. 916 (1982), reproduced in the Pet. App. commencing at 167 and 169; at 819 F.2d 895 (1987) (*"Crow II"*), reproduced in the Pet. App. commencing at 88; and at 969 F.2d 848 (1992) (*"Crow III"*), reproduced in the Pet. App. commencing at 58. A prior summary affirmance of the Court of Appeals' 1987 decision in *Crow II* is reported at 484 U.S. 997 (1988), reproduced in the Pet. App. at 87.

The opinion of the District Court in *Crow IV* is unreported and is reproduced in the Pet. App. commencing at 17. The prior reported opinion of the District Court, which was the subject of review by the Court of Appeals in *Crow I*, appears at 469 F.Supp. 154 (D. Mont. 1979), reproduced in the Pet. App. commencing at 197. The District Court's reported opinion reviewed in *Crow II* appears at 657 F.Supp. 573 (D. Mont. 1985), reproduced in

the Pet. App. commencing at 110. An unreported opinion of the District Court reviewed by the Court of Appeals in *Crow III* is reproduced in the Pet. App. commencing at 67.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1996. The Tribe's petition for rehearing was denied on November 21, 1996. Appendix to Cross-Petition at 1. The petition for rehearing of the State of Montana and the other petitioners was denied on February 21, 1997. Pet. App. at 228. The Tribe's conditional cross-petition is filed pursuant to Supreme Court Rule 12.5. The petition for a writ of certiorari (No. 96-1829) was docketed on May 16, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

In *Crow II*, the Court of Appeals for the Ninth Circuit held that Montana's severance and gross proceeds taxes on coal produced from the Tribe's coal deposits impermissibly infringed on the Crow Tribe's sovereignty and interfered with the policy of promoting tribal self-government and economic development underlying the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, were not narrowly tailored to achieve Montana's legitimate interest, and therefore were preempted by federal law. 819 F.2d 895, Pet. App. 88. *See Crow IV*, 92 F.3d at 828, Pet. App. 6 (summarizing the holding of *Crow II*). This Court summarily affirmed without opinion. 484 U.S. 997 (1988),

Pet. App. 87.[1] The issue presented in this conditional cross-petition arises from that holding and is based on one of its findings, that Montana's illegal coal taxes "impair the tribe's ability to negotiate leases with Shell Oil and other coal companies."

The provisions of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, are reproduced in the Appendix to this conditional cross-petition.

STATEMENT OF THE CASE

A. DISTRICT COURT JURISDICTION

The District Court has had jurisdiction over this action since it was brought by the Tribe in 1978 pursuant to 28 U.S.C. §§ 1331 (federal question), 1362 (Indian tribe as plaintiff and federal question) and 1343(a)(3) (action to redress deprivations under color of state law of rights secured by federal law). Since 1983 when the United States intervened as a plaintiff, the District Court also has had jurisdiction under 28 U.S.C. § 1345 (United States as plaintiff).

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[1] In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186 & n.17 (1989), this Court distinguished Montana's "unique" and "extraordinarily high" coal taxes which imposed a "substantial burden" on the Crow Tribe from the state oil and gas taxes there at issue, upheld the validity of those state oil and gas taxes as applied to tribal minerals, and declined to reexamine its summary affirmance in *Crow II*.

B. FACTUAL BACKGROUND

In 1972, the Tribe and Shell Oil Company (Shell) entered into a coal lease pursuant to the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a *et seq*. Following the Arab oil embargo in 1973 and the subsequent vast changes in the energy market, the Tribe began renegotiating the terms of its coal leases with Shell, Westmoreland and other coal companies. In November 1974, the Tribe and Westmoreland successfully renegotiated their 1972 lease. Pet. App. 30.

The Tribe then turned its attention to renegotiating the Shell lease. In late 1974 and early 1975, Shell entered into contracts with two utilities to sell them approximately 8 million tons of coal annually from its projected Crow mine. *Crow IV*, 92 F.3d at 830, Pet. App. 12-13; Pet. App. 38-89.

In April 1975, Montana enacted statutes imposing severance and gross proceeds taxes on coal produced within the State with no exception for coal owned by Indian tribes. Mont. Code Ann. § 15-35-101 to 111, 15-23-701 to 704. The severance tax rate charged on Crow coal produced during the 1975-1982 period was 30 percent of the value of the contract sales price of the coal. Pet. App. 25. The rate of the gross proceeds tax is equivalent to the number of mills levied for general property tax by the county in which the production occurred. Pet. App. 25-26. The amount of the gross proceeds tax on Crow coal varied somewhat from year to year but was generally in the range of approximately 5% of the contract sales price. Pet. App. 26. The effective rate of the

combined severance and gross proceeds tax exceeded 30%. *Crow II*, 819 F.2d at 899 n.2, Pet. App. 98.

Tribal representatives appeared before the Montana legislature and strongly opposed the imposition of the proposed severance and gross proceeds taxes on Crow coal on the grounds that:

> (1) they are so out of line with taxes imposed by other neighboring states that Crow coal will no longer be competitive and therefore our coal development program will suffer, and (2) . . . the taxes bear no relation to the responsibilities and burdens which coal development has imposed on the State of Montana . . . [and 3] . . . this level of taxation is so high that [it] becomes an unauthorized state interference with federally secured Indian property.

ER 1.[2] The Tribe proposed a compromise under which coal producers would receive a credit against state taxes for coal taxes paid to Indian tribes. The Senate Taxation Committee rejected the Tribe's proposal, commenting that "there would have to be court decreed settlements regarding Indian coal revenues." ER 5. *See Crow IV*, 92 F.3d at 829, Pet. App. 9. *See also*, Pet. App. 23.

In enacting the coal taxes, the Montana legislature found that strip-mined coal is in sufficient demand that:

> [A]t least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes. . . .

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[2] "ER" refers to the Tribe's excerpts of record filed with the Court of Appeals for the Ninth Circuit in *Crow IV*.

Mont. Code Ann. § 15-35-101(1)(e). In *Crow I*, 650 F.2d at 1113, Pet. App. 185, the Court of Appeals quoted this legislative finding and stated: "[b]y setting the severance tax rate at 30 percent of value, Montana made plain its intention to appropriate most of the economic rent."[3] *See also, Crow II*, 819 F.2d at 902, Pet. App. 104-05; *Crow IV*, 92 F.3d at 829, Pet. App. 10 ("we had . . . found [in *Crow I*] the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal . . . ").

The Tribe enacted its own 25% severance tax in early 1976. The tribal tax was approved by the Bureau of Indian Affairs as applied to the coal within the exterior surface boundaries of the Reservation (which included the coal leased to Shell). Pet. App. 19, 31.

The existence of dual tribal and state taxes created obvious and severe problems for the Tribe and Shell in renegotiating the terms of the Shell lease. Montana's taxes significantly reduced the compensation Shell could offer the Tribe. *See Crow I*, 650 F.2d at 1113 n.13, Pet. App. 186. Shell's chief negotiator testified in the 1984 *Crow II* trial that Shell would have paid coal taxes either to the Tribe or to the State and would have offered the Tribe an additional $480 million over a 20 year period if Montana had not sought to apply its taxes to the coal Shell had leased from the Tribe. He stated that he thought that would have made a difference in the negotiations. ER

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[3] " 'Economic rent' is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production." *Crow I*, 650 F.2d at 1113 n.12, Pet. App. 185.

37-38. The Tribal Chairman testified that Montana's taxes left no room for the Tribe and Shell to come up with a deal, ER at 48, and the Tribe's main negotiator stated that the Shell proposal would have been accepted in 1976 had it not been for Montana's severance tax. ER 54-55. There was no testimony linking the failure of the Tribe and Shell to reach agreement in the mid-1970s to any factor other than Montana's illegal taxes. Nor was there evidence presented by any witness that the Tribe and Shell would not have been able to agree on an amended lease if Montana had not sought to apply its taxes to the Tribe's coal. All of the other issues involved in the Tribe/Shell negotiations had been resolved in the November 1974 amended lease with Westmoreland which was concluded a few months before enactment of Montana's taxes.

The Court of Appeals found in *Crow II* that Montana's illegal taxes "impair the tribe's ability to negotiate leases with Shell Oil and other coal companies." 819 F.2d at 903, Pet. App. 109. That finding was not challenged at the 1994 trial and was restated in the District Court's 1994 decision. Pet. App. 38. *See also*, Pet. App. 41 ("[t]he existence of the Montana taxes left less room for the Tribe and Shell to negotiate more favorable financial terms to the Tribe").

Shell's would-be utility customers made other arrangements to purchase coal due to the inability of the Tribe and Shell to reach agreement on an amended lease in time to meet the utilities' needs. One of the utilities acquired its coal from a nearby mine in Montana. *See, Crow IV*, 92 F.3d at 830, Pet. App. 13; Pet. App. 40-41. The expert economist for the Tribe and the United States testified at the 1994 trial that the Tribe suffered damages

of more than $300 million because Shell was not able to fulfill its coal supply contracts with the utilities. He also testified that Montana and Big Horn County realized approximately $250 million in taxes and other revenues as a result of the coal purchased by Shell's would-be customer from the nearby, off-reservation mine. ER 121-22.

By the time Montana's coal taxes were held invalid in *Crow II* in 1987, the demand for coal from the Powder River Basin in Wyoming and Montana had significantly declined. The window of opportunity for marketing the Tribe's coal had closed. ER 228s-228u.

C. *CROW II.*

The holding of the Court of Appeals in *Crow II* that Montana's coal taxes interfered with the purposes underlying the Indian Mineral Leasing Act and infringed on the Crow Tribe's sovereignty was based on the following findings, among others: (i) Montana's "taxes increase the costs of production by the coal producers, reducing in turn the royalty that can be paid to the Tribe," 819 F.2d at 899, Pet. App. 97; (ii) Montana's taxes "forced the coal producers to charge higher prices, reducing the demand for their Montana coal and resulting in fewer sales for the producers and fewer royalties to the Tribe," *ibid*; (iii) "[b]y taking revenue that would otherwise go towards supporting the Tribe and its programs, and by limiting the Tribe's ability to regulate the development of its coal resources, the state tax threatens Congress' overriding objective of encouraging tribal self-government and economic development," 819 F.2d at 902-03, Pet. App. 107;

(iv) Montana's "high taxes affect tribal revenues by interfering with the Tribe's coal leasing efforts. Because of the taxes the lessee cannot find a buyer, making it difficult for Crow to find a lessee," 819 F.2d at 903, Pet. App. 108; and (v) Montana's taxes "interfere with tribal economic development and autonomy," *ibid.* *See, Crow III*, 969 F.2d at 848-49, Pet. App. 59-60 (reiterating several of the *Crow II* findings); and *Cotton Petroleum*, 490 U.S. at 186 & n.17 (distinguishing Montana's "unique," "unusually large" and "extraordinarily high" coal taxes which "imposed a substantial burden on the Tribe" and "had a negative effect on the marketability of coal produced in Montana" from New Mexico's oil and gas taxes there at issue).

D. PROCEEDINGS BELOW (IN *CROW IV*)

The District Court denied the claims of the Tribe and the United States for compensation based on the impairment of the Tribe's ability to negotiate with Shell. It acknowledged that the State's taxes left less room for the Tribe and Shell to reach agreement on financial terms and impaired the Tribe's ability to negotiate leases with Shell and others. It found, however, that there were "other sharp points of disagreement which clearly delayed successful negotiations," and "do not support a cause and effect relationship between Montana's coal taxes and the Tribe's alleged damages." Pet. App. 38, 41, 56. The District Court also found that the State's illegal taxes did not have as their "conscious objective" interference with the Tribe's lease with Shell and that "the record is devoid of evidence that defendants' coal taxes were calculated to cause damage to the Tribe." Pet. App. 41-42, 56.

In its legal conclusions, the District Court stated that "[t]he substantive elements of [the Tribe's contractual impairment] claim are drawn from the intentional tort of interference with contractual and business relations." It proceeded to apply Montana law which requires, *inter alia*, that the act be "willful," "calculated to cause damage" and "done with an unlawful purpose of causing damage or loss." Pet. App. 54-55. The District Court did not address the Tribe's arguments that a uniform federal rule should be applied to redress the violation of federal law or that the Tribe's claim should be treated as a request for equitable relief predicated on the violation of the Tribe's federally secured rights. Nor did the District Court consider the Tribe's contentions (predicated on *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 380-85 (1970); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946); and *R.H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934)) that Montana should bear the risk of any uncertainties created by its violation of federal law.

The Court of Appeals affirmed the denial of the contractual impairment claim on the basis of the District Court's finding that Montana's illegal taxes had not caused the impasse between the Tribe and Shell. It did not address the substantive elements of the claim or determine whether it should be viewed as a state law tort or a request for equitable relief predicated on the violation of federal law. *Crow IV*, 92 F.3d at 830-31, Pet. App. 12-14.

In the context of reversing the District Court's denial of the claim for recovery of the taxes illegally collected from Westmoreland, the Court of Appeals determined that the District Court had erred in finding that Montana

did not act with wrongful intent or an unlawful purpose. The Court of Appeals stated: "we had already found the coal taxes were intentionally and illegitimately levied to appropriate most of the economic rent from Tribal coal." *Crow IV*, 92 F.3d at 829, Pet. App. 9-10. Montana's wrongful intent and unlawful purpose were not considered in the portion of the Court of Appeals' opinion affirming the denial of the Shell contractual impairment claim.

With regard to the legal standards, burdens and presumptions governing the causation issue, the Court of Appeals concluded that the *Bigelow* rule, that "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," applied only to proof of the amount of damages, not to causation. *Mills* was distinguished on the ground that it was a securities case. The Court of Appeals stated: "the Tribe has offered no reason to extend to this area the Supreme Court's analysis of proof of causation in securities cases set out in" *Mills*. 92 F.3d at 830 n.4, Pet. App. 13. The Tribe's petition for rehearing was denied. Cross-Pet. App. at 1.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The Tribe's conditional cross-petition should be granted if the petition filed by Montana and its co-petitioners is granted. The questions presented in the petition and in the conditional cross-petition arise out of the same wrong, Montana's illegal application of its taxes to the Tribe's coal. The general issue raised in this conditional

cross-petition – the legal standards, burdens and presumptions applicable to determining causation in fashioning appropriate equitable relief to remedy violations of federal law – is an important matter that occurs in various contexts including civil rights, pension, antitrust, environmental and securities law, as well as federal Indian law.

The holding that the Tribe is not entitled to any relief on its contractual impairment claim, notwithstanding the illegality of Montana's "extraordinarily high" taxes and the findings that those taxes impaired the Tribe's ability to market its coal and to negotiate leases with Shell and other coal companies, has significant and far-reaching consequences. Allowing Montana to escape liability for its actions, which were undertaken with wrongful intent and interfered with the Tribe's federally secured rights to regulate and market its coal and to receive a large portion of the economic benefits of its mineral wealth,[4] thwarts the firm and overriding congressional policy of encouraging tribal self-government and economic development.[5]

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[4] *See Crow I*, 650 F.2d at 1112-14, Pet. App. 183-89; *Crow II*, 819 F.2d at 896, 898, Pet. App. 91, 95-96.

[5] The recovery of the taxes illegally collected from Westmoreland would not compensate the Tribe for the additional and separate injury resulting from the impairment of its ability to renegotiate its coal leases with Shell. Under the decisions below, there would not be any remedy for the enormous wrongs intentionally inflicted on the Tribe from 1975 through 1987 if there were no Westmoreland mine even though the Court of Appeals and this Court found that the illegal taxes had a negative effect on the marketability of tribal coal, interfered with the Tribe's leasing efforts, impermissibly limited the Tribe's ability to regulate the development of its coal

In the absence of any relief, the Tribe's injury in all likelihood will be permanent because the market for coal from the Powder River basins in Wyoming and Montana plummeted by the time the taxes were declared invalid 13 years after they were enacted, 10 years after the Tribe's suit was filed. ER 228s-228u. As recognized in several decisions of this Court and of the courts of appeals, other federal laws and policies similarly would be frustrated by the imposition of standards and burdens of proof which are difficult to meet because of the uncertainties created by the defendant's wrongful acts. Applying those standards to proof of causation (or injury) would severely limit or preclude relief to correct violations of federal law.

The Ninth Circuit's holding conflicts with this Court's decisions in *Bigelow, Mills* and other cases, particularly *J. Truett Payne Co., Inc. v. Chrysler Motors,* 451 U.S. 557 (1981). Justice Frankfurter *dissented* in *Bigelow* on the precise ground that this Court had erred by applying the principle that wrongdoers must bear the risk of the uncertainties created by their own wrongs to the determination of the fact of injury, i.e., causation, as opposed to the amount of damages. 327 U.S. at 267. The Ninth Circuit followed the *Bigelow* dissent rather than this Court's holding. The Ninth Circuit's decision also conflicts with the decisions of other federal appellate courts which have applied the *Bigelow* rule to causation and issues other than the determination of the amount of damages. There is no sound reason either in law or policy for the narrow and restricted interpretation of *Bigelow*

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resources and interfered with tribal economic development and autonomy.

and its progeny adopted by the Ninth Circuit in the instant case.

Similarly, there is no justification for limiting the analysis of causation applied by this Court in *Mills* to securities cases. To the contrary, the principles underlying *Mills* apply whenever courts are required to inquire about what would have happened if violations of federally secured rights had not occurred, especially where, as here, the vagaries of the business marketplace create difficult problems of proof. In these situations, doubts are properly resolved against the wrongdoer, in favor of the victim and in a manner that furthers the purpose of the underlying federal law or policy.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *BIGELOW* AND WITH SUBSEQUENT DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

It is firmly established as the law of this case that the Tribe's federally secured rights were wrongfully invaded by Montana's coal taxes and that Montana's illegal taxes injured the Tribe by impermissibly impairing its ability to negotiate coal leases with Shell and other coal companies. The issue presented in this conditional cross-petition concerns the standards, presumptions and burdens applicable to fashioning an appropriate remedy to make good that wrong. The Tribe's position is that the Ninth Circuit and the District Court erred by denying the Tribe a remedy for the contractual impairment wrong inflicted by Montana, by not recognizing that their findings establish that the Tribe was injured and by failing to resolve doubts regarding causation against the wrongdoer and in favor of the victim.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992), a civil rights case, this Court reaffirmed the fundamental and longstanding principle of federal jurisprudence that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done," quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). The origins of this rule were traced to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), and *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838). *See, Albemarle Paper Co. v. Moody*, 422 U.S. 405, 413-17 (1975) (where federal laws are violated, federal courts must exercise their remedial equitable powers to further the transcendent legislative purposes, not apply equity in a manner "which varies like the Chancellor's foot").

In circumstances where, as here, a wrong has occurred and the party whose federally secured rights were violated suffers an injury, the law favors the fashioning of monetary relief for the victim. As stated in *Bigelow*:

> The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's rights.

327 U.S. at 265.

The basis for adopting rules which encourage damage remedies to redress violations of federal law once a violation of a federal right and an injury are shown was

explained in *Chrysler Motors*, 451 U.S. at 566-67 (with citations omitted):

> Our willingness to accept a degree of uncertainty in . . . [*Bigelow* and other] cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's . . . violation. But our willingness also rests on the principle articulated in cases such as *Bigelow*, that it does not " 'come with very good grace' " for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.[6]

Neither of the factors described in *Chrysler Motors* supports the distinction made by the Ninth Circuit in the instant case between establishing causation (or injury) and proving the amount of damages. The difficulty of establishing what would have happened in the business world in the absence of the violation of federal law applies equally to both inquiries as does the inequity of the wrongdoer insisting upon specific and certain proof

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[6] In *Chrysler Motors*, unlike the case at bar, it was not clear whether the defendant was a wrongdoer or whether the plaintiff had been injured by an antitrust violation. 451 U.S. at 567 n.5, 568. The case was remanded for those determinations. If a violation were established, the "burden [of proving antitrust *injury and damages*] is to some extent lightened." 451 U.S. at 468 (emphasis added).

of the injury. Indeed, the second factor is more compelling as applied to causation because the failure to prove the fact of injury would defeat the entire claim.

The Ninth Circuit's decision below conflicts with the reasoning of *Chrysler Motors*. It is difficult to have sure knowledge of what would have transpired with the Crow/Shell lease in the absence of Montana's violations of the Tribe's rights. It is established, however, that the Tribe was injured because the illegal taxes impaired the Tribe's ability to negotiate the terms of its lease with Shell and Montana's taxes left less room for the Tribe and Shell to negotiate more favorable financial terms to the Tribe. *See supra* at 7, 9. As in *Chrysler Motors*, "[i]t does not come with very good grace" for Montana to insist upon specific and certain proof of the injury it inflicted. Shifting the burden of proof is required to avoid the inequity of allowing a wrongdoer to defeat the recovery of damages by insisting that the victim establish what would have happened in the absence of the violation of federal law. *Chrysler Motors*, 451 U.S. at 568.[7]

The state of the law regarding establishing damages after a violation of a federal right and an injury are shown was summarized in the concurring opinion of then Justice Rehnquist in *Albemarle Paper Co. v. Moody*, 422 U.S.

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[7] *Bigelow* also rests on the broader, "fundamental and unquestioned . . . principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." *R.H. Sterns*, 291 U.S. at 61-62; *see also, Snepp v. United States*, 444 U.S. 507, 515-16 (1980). Not applying the *Bigelow* rule to proof of causation or injury substantially increases the probability that violators of federal laws will profit from their misdeeds.

405 (1975), a Title VII employment discrimination case. The question in *Albemarle* was whether back pay should be awarded once it was determined that the employer and labor union had unlawfully discriminated against black employees. Citing and quoting the *Bigelow* rule, Justice Rehnquist stated that an award of back pay "would follow virtually as a matter of course" from a finding that an employer had unlawfully discriminated contrary to Title VII. 422 U.S. at 442.

As explained in *Chrysler Motors* and succinctly summarized in the *Albemarle* concurrence, the *Bigelow* rule kicks in once a violation of a federal right and an injury have occurred. At that point, "the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," *Bigelow*, 327 U.S. at 265, and an award of damages "follow[s] virtually as a matter of course." The lower courts erred by not applying this rule in the instant case.

Contrary to the appellate decision below, the *Bigelow* rule has not been limited to determining the amount of damages. Justice Frankfurter dissented in *Bigelow* on the precise ground that the Court did not observe what he viewed as the "decisive distinction . . . between proving that some damages were 'the certain result of the wrong' and uncertainty as to the dollars and cents value of such injuring wrong." 327 U.S. at 267 (citation omitted). The dissent's position was that the rule resolving doubts against the wrongdoer should be applied to the latter but not the former.[8] The Ninth Circuit erred by following the *Bigelow* dissent.

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[8] This precise issue was squarely presented to the *Bigelow* Court. The lower court had reversed judgment for the plaintiffs

This Court has not limited the *Bigelow* rule to proving the amount of damages. To the contrary, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 & n.7 (1962), this Court quoted the *Bigelow* rule with approval in the context of reversing the lower court's holding that there was insufficient evidence to support a finding that the defendant's allegedly wrongful conduct in fact caused injury to the plaintiff's business. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), this Court stated that the plaintiff's burden of proving the fact of damage "is satisfied by its proof of *some* damage flowing from the unlawful" act; "inquiry beyond this minimum point goes only to the amount and not the fact of damage." 395 U.S. at 114 n.9 (emphasis in original).[9] In

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on the sole ground that the evidence of damage or injury was not sufficient for submission to the jury. 327 U.S. at 254. The *Bigelow* defendants argued that it was impossible to establish any measure of damages because no one could know what would have happened if their violations had not occurred. 327 U.S. at 260-63. Over the dissent's objection, this Court applied the controlling legal principles regarding the standards and burdens of proof to both causation (or injury) and the amount of damages. Indeed, this Court cited with approval to the rule governing collisions between vessels, that where the offending vessel has violated regulations prescribed by statute, the wrongdoer may not object to the plaintiff's reasonable estimate of both the cause of injury and of its amount. 327 U.S. at 265.

[9] Applying this standard to the case at bar, the Tribe's burden of proving "*some* damage" was satisfied by the findings that Montana's illegal taxes impaired the Tribe's ability to negotiate coal leases with Shell and other coal companies and left less room for the Tribe and Shell to negotiate financial terms more favorable to the Tribe. The lower courts therefore erred by denying *any* recovery on the Tribe's contractual impairment claim.

addition, the *Zenith* Court cited and followed the *Bigelow* rule with regard to proof of the fact of damage and the existence of the necessary causal relation between the illegal act and the claimed damage. 395 U.S. 122-25; *see also, Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1113 n.* (1991) (Kennedy, J. concurring and dissenting); *Chrysler Motors;* and *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 143-44 (1968) (White, J. concurring). These decisions conflict with the appellate decision below and are consistent with *Bigelow*'s instruction that federal courts find "some way in which damages can be awarded where a wrong has been done." 327 U.S. at 265.

The Ninth Circuit's narrow application of the *Bigelow* rule also conflicts with the decisions of other circuits. In *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising Inc.*, 891 F.2d 1127, 1144 (4th Cir. 1989), *reversed on other grounds*, 499 U.S. 365 (1991), and *Metrix Warehouse v. Daimler-Benz Aktiengesellshaft*, 828 F.2d 1033, 1043 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988), the Fourth Circuit applied the *Bigelow* rule in the context of causation and stated: "a wrongdoing defendant should not profit at the expense of his victim where it is his own . . . conduct that precludes direct and specific proof of damage." In *Thompson v. Missouri Bd. of Parole*, 929 F.2d 396, 401 (8th Cir. 1991), and *United States ex rel. Schuster v. Vincent*, 524 F.2d 153, 160 (2d Cir. 1975), *Bigelow* was cited for the broad rule that "equity . . . resolves uncertainties against those whose wrongful acts or omissions created them." In these latter two cases, the *Bigelow* rule was applied in favor of prisoners seeking habeas corpus in situations not involving any damage claim. The Seventh Circuit followed the *Bigelow* rule in the context of causation in

Switzer Brothers, Inc. v. Locklin, 297 F.2d 39, 47 (1961), *cert. denied*, 369 U.S. 851 (1962), as did First Circuit in *Haverhill Gazette Company v. Union Leader Corp.*, 333 F.2d 798, 805-07 & n.16 (1964), *cert. denied*, 379 U.S. 931 (1964).[10]

The holding of the Ninth Circuit limiting the *Bigelow* rule to proof of the amount of damages, as opposed to causation or injury, therefore conflicts with decisions of this Court and with several courts of appeals. The applicability of the *Bigelow* rule to proof of causation (or injury) presents a significant question which arises in

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[10] *United States Football League v. National Football League*, 842 F.2d 1335 (2d Cir. 1988), is a mixed bag in terms of its relationship to the instant case. On the one hand, it followed *Zenith* by approving a jury instruction that plaintiffs in an antitrust case do not have to prove that the unlawful activity was the sole cause of injury or that it was a greater cause than other factors. They only have to show that their injuries "to *some* degree" resulted from defendants' violations. 842 F.2d at 1377 (emphasis in original). This standard, which clearly was satisfied in the instant case, conflicts with the requirement imposed by the courts below that the illegal conduct must be the primary or major, if not the sole, cause of the injury. On the other hand, the Second Circuit also stated that the *Bigelow* rule applies to determining the amount of damages. 842 F.2d at 1378, 1379. In this latter respect, it comes closer than any other reported decision of the courts of appeals of which the Tribe is aware to the holding of the Ninth Circuit below. The Second Circuit's interpretation of *Bigelow*, however, occurs in the context of a discussion of the need for the plaintiff in an antitrust action to segregate the amount of damages reasonably attributable to lawful competition or other factors, such as management problems or unsuccessful business strategies, from those attributable to unlawful acts. That requirement, which goes to determining the amount of damages, not injury, has not been raised or considered in the instant case.

many areas and potentially affects everyone injured by a violation of federal law who may seek monetary recovery. The issue warrants review by this Court if the petition filed by Montana and Big Horn County is granted.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *MILLS*.

This Court specifically addressed the causation issue in the context of fashioning an appropriate equitable remedy for a violation of a federal law in a business setting in *Mills*. Minority shareholders brought suit alleging that the proxy statement soliciting shareholders' votes in favor of a merger was misleading and violated a provision of the Securities Act and an implementing regulation. The District Court held that the proxy statement was defective in a material way and that a causal relationship had been shown by proof that the votes of a substantial number of minority shareholders had been necessary for approval of the merger. While the Court of Appeals affirmed the ruling that the proxy statement was materially deficient, it concluded that it was not practical to inquire into the extent to which thousands of individuals had relied on the defective aspects of the proxy statement in casting their votes. In lieu of determining causation, the Court of Appeals held that the issue would be resolved by proof of the fairness of the terms of the merger. If the District Court found that the merger was fair, it would be justified in concluding that it would have been approved if the proxy statement had not been materially defective.

This Court rejected both solutions to the problems posed by the causation issue. The Court of Appeals' decision "would subvert the congressional purpose of ensuring full and fair disclosure to shareholders." 396 U.S. at 381-83. This Court held that the finding that the misleading aspect of the proxy statement was material sufficed to establish the minority shareholders' cause of action. "There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof of whether the defect actually had a decisive effect on the voting." 396 U.S. at 384-85. This Court's objective test was found more practical to administer and adjudicate. In addition, "by resolving doubts in favor of those the statute is designed to protect, [it] will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions." 396 U.S. at 385. The case was remanded to the District Court to fashion an appropriate equitable remedy that effectuated the congressional purpose. 396 U.S. at 386.

Although *Mills* does not cite to *Bigelow*, its reasoning and result are consistent with and supported by the *Bigelow* rule. It applies the principle of "resolving doubts in favor of those the statute is designed to protect" to proof of causation (or injury).

As previously noted (*supra* at 11), the Ninth Circuit rejected the Tribe's reliance on *Mills* on the ground that it was a securities case. *Crow IV*, 92 F.3d at 830 n.4., Pet. App. 13. There is no doubt that the purposes and policies of the federal law that was violated are important factors

in formulating appropriate equitable relief. *See, e.g., Albemarle*, 422 U.S. at 413-17, summarized *supra* at 15.[11] But the issue now posed in the instant case is not the precise form the remedy should take. Rather, the question is what standards of proof are applicable to determining whether all relief should be precluded due to the difficulty of establishing "what plaintiff's situation would have been in the absence of the defendant's . . . violation." *Chrysler Motors*, 451 U.S. at 566-67, *quoted supra* at 16. *Mills* supports application of the *Bigelow* rule to the issue of causation (or injury) whenever a wrongdoer in a business context seeks to escape responsibility for its violation of federal law by "insist[ing] upon specific and certain proof of the injury which it itself has inflicted." *Chrysler Motors*, 451 U.S. at 566-67. There is no reason in law or in policy to distinguish between violations of securities laws and other invasions of federally secured rights.

Whether this Court's analysis of proof of causation in *Mills* should be applied generally in fashioning appropriate equitable relief once a violation of federal law is established presents an important issue. It merits review if this Court grants the petition filed by Montana and Big Horn County.

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[11] If the application of strict standards and burdens of proof results in the wrongdoer avoiding any liability for its invasion of federally secured rights, the purposes and policies of the law always would be frustrated. *See, e.g., Franklin*, 503 U.S. at 66-67. That is as true here as it was in *Mills*. *See supra* at 12 n.5.

CONCLUSION

In the process of distinguishing and severely restricting the applicability of this Court's holdings in *Bigelow* and *Mills*, the Ninth Circuit erected formidable barriers to victims obtaining equitable relief to correct invasions of their federally secured rights. The existence of these barriers in the Nation's most populous circuit court of appeals undermines "[t]he constant tendency of the courts . . . to find some way in which damages can be awarded where a wrong has been done." *Bigelow*, 327 U.S. at 265.

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be granted if this Court grants the petition filed by Montana and Big Horn County (No. 96-1829).

Respectfully submitted,

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June 1997.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE CROW TRIBE OF INDIANS, Plaintiff-Appellant, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. STATE OF MONTANA, Director, Ken Nordtvedt; COUNTY OF BIG HORN; TREASURER, BIG HORN COUNTY, MARTHA FLETCHER, Defendants-Appellees.	No. 95-35093 D.C. No. CV-78-00110-BLG
THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor-Appellant, v. STATE OF MONTANA, Director, Ken Nordtvedt; COUNTY OF BIG HORN; TREASURER, BIG HORN COUNTY, MARTHA FLETCHER, Defendants-Appellees.	No. 95-35096 D.C. No. CV-78-00110-JDS ORDER (Filed Nov. 21, 1996)

Before: BROWNING, WRIGHT, and CANBY, Circuit Judges

The "Petition for Rehearing of the Crow Tribe of Indians" filed October 29, 1996, is DENIED.

UNITED STATES CODE TITLE 25 – INDIANS – CHAPTER 12: "LEASE, SALE, OR SURRENDER OF ALLOTTED OR UNALLOTTED LANDS" 25 U.S.C. §§ 396(a)-(g)

§ 396a Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

§ 396b Public auction of oil and gas leases; requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the

highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title.

§ 396c Lessees of restricted lands to furnish bonds for performance

On and after May 11, 1938, lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: Provided, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

§ 396d Rules and regulations governing operations; limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

§ 396e Officials authorized to approve leases

The Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

§ 396f Lands excepted from leasing provisions

Sections 396a, 396b, 396c, and 396d of this title shall not apply to the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and

asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.*

§ 396g Subsurface storage of oil or gas

The Secretary of the Interior, to avoid waste or to promote the conservation of natural resources or the welfare of the Indians, is authorized in his discretion to approve leases of lands that are subject to lease under section 396 or 396a of this title, for the subsurface storage of oil and gas, irrespective of the lands from which initially produced, and the Secretary is authorized, in order to provide for the subsurface storage of oil or gas, to approve modifications, amendments, or extensions of the oil and gas or other mining lease(s), if any, in effect as to restricted Indian lands, tribal or allotted, and may promulgate rules and regulations consistent with such leases, modifications, amendments, and extensions, relating to the storage of oil or gas thereunder. Any such leases may provide for the payment of a storage fee or rental on such stored oil or gas or, in lieu of such fee or rental, for a royalty other than that prescribed in the lease when such stored oil or gas is produced in conjunction with oil or gas not previously produced. It may be provided that any oil and gas lease under which storage of oil or gas is so authorized shall be continued in effect at least for the period of such storage use and so long thereafter as oil or

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* This provision was amended by the Act of September 16, 1959, 73 Stat. 567, and the Act of May 17, 1968, 82 Stat. 123, to remove the exception for the Crow Indian Reservation. *See, Crow I,* 650 F.2d at 1111 n.6.

gas not previously produced is produced in paying quantities.